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Espionage Case Pits CIA Against News Media

By David Wise

WASHINGTON

When a former communications specialist for the National Security Agency, comes to trial on charges of espionage, the government will have to decide how much to reveal about the highly sensitive secrets he is charged with having sold to the Soviets.

Ronald W. Pelton's trial may begin this week. According to pretrial proceedings and court papers, Pelton strolled into the Soviet Embassy in 1980 and told the Soviets about a top-secret National Security Agency intelligence-gathering program targeted at the Soviet Union. The Soviets were obviously interested—in the information and in protecting Pelton. They had him shave off his beard before leaving the embassy so that he would not be recognized. He was arrested only last November, after a tip from a Soviet defector.

Now, however, the director of the Central Intelligence Agency, William J. Casey, is worried that details of the NSA operation have already begun to leak to the press. The CIA director apparently wants the Administration to prosecute the news media to dam up what he sees as a torrent of leaks. Casey softened his position a little last week, but not much.

The press is constitutionally protected and prosecution by the government would be unprecedented. But there are those who believe that such action was foreshadowed by the case of Samuel L. Morison. When the Navy intelligence analyst was convicted of espionage for leaking spy-satellite photographs to a British magazine, the federal prosecutor stood on the courthouse steps and scoffed at journalists who suggested the case was a threat to freedom of the press.

"Remember," said Michael Schatzow, the assistant U.S. attorney in Baltimore, "the same picture was published by the Washington Post and the TV networks, and nobody has prosecuted them."

That was in December. Early this month, Casey did exactly what many editors and reporters were worried about. He went to the Justice Department and discussed the possible prosecution of the Washington Post and four other publications for publishing stories about U.S. intelligence-gathering. The CIA director seemed particularly upset about stories dealing with communications intelligence—NSA's ability to intercept the messages of other nations.

Casey met with Dep. Atty. Gen. D. Lowell Jensen on May 2, and later that day warned two editors of the Post that he had "five absolutely cold" violations of the espionage laws by that newspaper, the New York Times, Time, Newsweek and the Washington Times. He said all five had violated a section of the Espionage Act that bars the publication of stories about communications intelligence.

The law in question is Section 798 of Title 18 of the U.S. Code; it was enacted in 1950 but has never been applied to government officials who leak—or to reporters who receive those leaks. It forbids transmittal or publication of classified information about codes, cryptographic equipment, intercepts of communications or the contents of intercepts. Violators are subject to a fine of $10,000 and 10 years in prison.

Casey also issued an advance warning, telling the Post editors that the newspaper might be prosecuted if it published another story. That story, officials here say, told of the same NSA intelligence-gathering operation that is the subject of the Pelton case.

By last week, Casey had backed down somewhat, saying he did not favor prosecuting the press for recent "past offenses." But he implied he would push for indictments if there were future violations. "The law . . . dealing with communications intelligence must now be enforced," he said.

The Justice Department has not embraced Casey's get-tough policy with enthusiasm, although Atty. Gen. Edwin Meese III has never ruled out prosecution of the media. "I think it depends on the circumstances of the case," he told a press conference last year.

Nor is Casey's anti-leak rhetoric without precedent. Only last month the Pentagon dismissed a senior official, Michael E. Pillsbury, for having allegedly leaked a report that the Administration was about to supply rebels in Angola and Afghanistan with Stinger anti-aircraft missiles.

The Administration is closely watching the outcome of the Morison case. The former Navy analyst, grandson of the late Samuel Eliot Morison, the Harvard historian, is free on $100,000 bail while he appeals his two-year prison sentence.

Morison's lawyer, Mark Lynch, points out that his client is the first leaker to be convicted and only the second to be tried. The first was Daniel Ellsberg, the man who leaked the Pentagon Papers to the press; his case was thrown out of court because of improper activities directed against him by the Nixon White House.

In his appeal, Lynch plans to emphasize that the Espionage Act was passed to catch spies, not to deal with leaks by government officials to the press. Indeed, precisely because no specific law against leakers exists, the CIA has tried for years to get Congress to pass one.

With certain narrow exceptions, including Section 798, present law does not forbid the disclosure of classified information as such. Last year, the CIA sent a draft bill to the White House that would have made leaks of classified data a crime. But the measure was not sent to Congress, in part because the Justice Department thought it might achieve much the same result through the conviction of Morison.

"The espionage statute was not intended to deal with leaks," Lynch said. "The history of the government trying to get a statute dealing with leaks proves that." At least two of the stories that roused Casey's ire dealt with the U.S. intercept of Libyan messages to its People's Bureau in East Berlin. Ironically, President Reagan himself disclosed the content of those messages in a nationwide television address on April 14. Reagan paraphrased the messages, arguing that they proved Libyan responsibility for the bombing of the La Belle discotheque in West Berlin, citing that terrorist act as justification for the U.S. raid against Libya.

Although such communications intercepts have been disclosed by the government in the past—after the Soviets shot down the Korean jetliner, for example—the President took an unprecedented step in discussing the content of the Libyan cables. He was, by implication, revealing that NSA had broken the Libyan code. Intercepted diplomatic messages have not been officially divulged in the past, precisely because the government normally does not want to reveal which codes it can read.

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Intelligence officials, however, draw a distinction between presidential disclosures, which they say may on rare occasions be required, and unauthorized leaks. George V. Lauder, the CIA's director of public affairs, argues that Casey is responsible by law for protecting "sophisticated technical systems that cost billions of dollars." It makes little difference, Lauder maintains, whether information about such systems is passed on to the Soviets by spies or printed in the press; the result is "equally harmful."

On the other hand, James Bamford, the author of "The Puzzle Palace," a detailed book about NSA activities, contends that applying Section 798 to the press would create an official secrets act in America. Reporters, he points out, "can't be expected to know what is classified and what isn't. The only way to be sure would be to have newsmen check their stories with the government every time. That's the way they do it in the Soviet Union."

The Reagan Justice Department considered prosecuting Bamford for writing his book, but did not proceed. Earlier, the Ford Administration apparently considered prosecuting three reporters under Section 798. Ford's former press secretary, Ron Nessen, has identified them as Bob Woodward, of the Washington Post, and Tad Szulc and Nicholas Horrock, then of the New York Times.

Damage from leakage is certainly arguable but prosecuting the press for passing leakage along would create an entirely different America. It is not what the framers of the Constitution had in mind when they wrote the First Amendment. □

David Wise writes frequently about intelligence and secrecy.

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